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18 CATALIN PANOV

19
20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**

22
23 ANTONIO LOPEZ, individually;
24 JOHANNA LOPEZ, individually; M.R.,
25 by and through his guardian ad litem,
April Rodriguez, individually and as
successor in interest to Brandon Lopez;
B.L. and J.L., by and through their
guardian ad litem Rachel Perez,
individually and as successor in interest
to Brandon Lopez; S.L., by and through
his guardian ad litem, Rocio Flores,
individually and as successor in interest
to Brandon Lopez,

26 Plaintiffs,

27 vs.

28 CITY OF ANAHEIM; CITY OF
SANTA ANA; DAVID VALENTIN;
JORGE CISNEROS; PAUL
DELGADO; BRETT HEITMAN;
KENNETH WEBER; CAITLIN
PANOV; DOES 1-10,

Defendants.

Case No. 8:22-cv-1351-JVS-ADS
[Hon. James V. Selna, Dist. Judge; Hon.
Autumn D. Spaeth, M. Judge]

**NOTICE OF MOTION AND
MOTION BY DEFENDANTS FOR
SUMMARY JUDGMENT, OR
PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

*Filed Concurrently with Statement of
Undisputed Facts; Declaration of
Abigail J.R. McLaughlin; Notice of
Lodging; and [Proposed] Order*

Date: August 12, 2024

Time: 1:30 p.m.

Crtrm.: 10C

FPTC Date: September 9, 2024
Trial Date: September 17, 2024

1 **TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:**

2 NOTICE IS HEREBY GIVEN THAT, on the 12th day of August, 2024, at 1:30
 3 p.m., in Courtroom 10C of the above-captioned Court, located at the Ronald Reagan
 4 Federal Building and United States Courthouse, 411 West Fourth Street, Santa Ana,
 5 California 92701, Defendants CITY OF ANAHEIM, JORGE CISNEROS, PAUL
 6 DELGADO, BRETT HEITMAN, KENNETH WEBER, and CATALIN PANOV
 7 (“Anaheim Defendants”) will move this Court for summary judgment, or partial
 8 summary judgment, on the remaining operative claims in Plaintiffs’ Second Amended
 9 Complaint for Damages [Dkt. 71], upon the following grounds:

10 1. Defendants JORGE CISNEROS, PAUL DELGADO, BRETT
 11 HEITMAN, KENNETH WEBER, AND CATALIN PANOV are entitled to judgment
 12 on Plaintiffs ANTONIO LOPEZ and JOHANNA LOPEZ (“Plaintiffs”) cause of
 13 action under 42 U.S.C. § 1983 for interference with familial relationships.

14 2. Defendants CITY OF ANAHEIM and JORGE CISNEROS are entitled
 15 to judgment on Plaintiffs’ cause of action under 42 U.S.C. § 1983 for municipal
 16 liability and supervisory liability for unconstitutional custom or policy.

17 3. Defendants CITY OF ANAHEIM and JORGE CISNEROS are entitled
 18 to judgment on Plaintiffs’ cause of action under 42 U.S.C. § 1983 for municipal
 19 liability and supervisory liability for ratification.

20 4. Defendants CITY OF ANAHEIM and JORGE CISNEROS are entitled
 21 to judgment on Plaintiffs’ cause of action under 42 U.S.C. § 1983 for municipal
 22 liability and supervisory liability for failure to train.

23 5. Defendants are entitled to judgment on Plaintiff JOHANNA LOPEZ’s
 24 cause of action under California law for negligent infliction of emotional distress
 25 (bystander negligence).

26 6. Defendants JORGE CISNEROS, PAUL DELGADO, BRETT
 27 HEITMAN, KENNETH WEBER, AND CATALIN PANOV are entitled to judgment
 28 on Plaintiffs’ claim for punitive damages.

This motion for judgment or partial summary judgment is made pursuant to Fed. R. Civ. P. 56, and is based upon this notice and memorandum of points and authorities filed and served herewith; the statement of uncontested facts and conclusions of law, the declaration of attorney Abigail J.R. McLaughlin and exhibits filed and served concurrently; the notice of lodging of non-paper exhibits filed and served concurrently; the proposed judgment lodged and served concurrently; the papers and records on file in this action; and upon such additional evidence and argument as may be properly before this Court at the time of the hearing.

This motion is made following the conference of counsel pursuant to C.D. Local Rule 7-3, which was initiated via written correspondence from Defendants' counsel on July 1, 2024 and completed via call between the parties' counsel on July 9, 2024.

DATED: July 15, 2024

LEWIS BRISBOIS BISGAARD & SMITH LLP

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HEITMAN, KENNETH WEBER, and
CATALIN PANOV

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION AND SUMMARY OF THE ARGUMENT.**

3 This Court should issue summary judgment for Defendants in this police/civil
 4 rights case about the fatal shooting of reportedly gun-armed car-theft suspect Brandon
 5 Lopez after he led police on a pursuit where, after a lengthy barricade/standoff with
 6 Anaheim PD and Santa Ana PD, Lopez fled from his vehicle, initially running away
 7 from officers, and then, despite commands to the contrary, ran toward officers holding
 8 an object that officers believed to be a gun, for the following reasons:

9 First, Plaintiffs Antonio Lopez and Johanna Lopez's ("Plaintiffs" and
 10 decedent's parents) claim for interference with familial relations fails as a matter of
 11 law. Defendants Paul Delgado, Brett Heitman, Kenneth Weber, and Catalin Panov
 12 ("Anaheim Officer Defendants") did not act with a purpose to harm Plaintiffs'
 13 decedent Brandon Lopez unrelated to law enforcement objectives. Rather, when
 14 confronted with a reportedly armed individual who had engaged in a vehicular pursuit,
 15 then ran towards officers holding an object believed to be a gun, the Anaheim Officer
 16 Defendants appropriately used lethal force in self-defense (while shouting "gun").

17 Second, Plaintiffs' claims for *Monell* and supervisory liability fail as a matter
 18 of law. As the Anaheim Officer Defendants did not violate Mr. Lopez's constitutional
 19 rights during the incident, Plaintiffs cannot establish *Monell* and supervisor liability,
 20 which requires an underlying constitutional violation to have occurred in the
 21 underlying incident. Further, Plaintiffs lack any material basis for their allegation that
 22 Defendants City of Anaheim and City of Anaheim Police Chief Jorge Cisneros
 23 implemented a specific policy, practice, or custom that was the "moving force" behind
 24 a constitutional violation, that there was a program-wide inadequacy in training at the
 25 City of Anaheim Police Department ("APD"), and/or that they ratified the Anaheim
 26 Officer Defendants' conduct during the incident.

27 Third, Plaintiff Johanna Lopez's claim for negligent infliction of emotional
 28 distress based on a bystander liability theory fails as a matter of law because Plaintiff

1 Johanna Lopez was not present at the scene of the incident and was not aware that the
2 Anaheim Officer Defendants were harming Mr. Lopez at the time of the incident (put
3 simply, she was *not* a contemporary eyewitness to the shooting event).

4 Fourth and finally, Plaintiffs are not entitled to punitive damages because the
5 Anaheim Officer Defendants did not act with malice during the incident. Summary
6 judgment should thus be granted.

7 | P 2. STATEMENT OF UNCONTROVERTED FACTS.

A. Mr. Lopez Is Suspected of Vehicular Theft and Flees Traffic Stop, Leading APD Officers On Vehicular Pursuit.

On September 28, 2021, at about 3:00 p.m., APD Officer Joseph Gross completed a stolen vehicle report regarding a black Dodge Charger. [SUF 1.] Brandon Lopez was identified as the suspect regarding the theft of the black Dodge Charger. [SUF 2.] Mr. Lopez had an active warrant for armed robbery . [SUF 3.]

14 APD officers located the stolen Dodge Charger in Santa Ana, California and,
15 at about 5:15 p.m., tried to conduct a traffic stop. [SUF 4.] The driver of the stolen
16 vehicle, later confirmed to be Mr. Lopez, fled the stop: leading officers on a vehicle
17 pursuit for approximately 30 minutes through Tustin, Irvine, and Santa Ana. [SUF
18 5.] During the vehicle pursuit, Mr. Lopez ran red lights and stop signs, and he drove
19 into oncoming traffic. [SUF 6.] Mr. Lopez was also involved in a traffic collision,
20 but he drove away from the scene of the collision. [SUF 7.] This information was
21 radioed to the APD officers, along with his criminal history/warrants. [SUF 8.]

22 At about 5:49 p.m., Mr. Lopez's vehicle became disabled/immobilized on
23 partially constructed train tracks, after driving into a construction zone. [SUF 9.]

24 || B. Mr. Lopez's Stand Off With Law Enforcement.

APD Officers arrived to execute a high risk vehicle stop on Mr. Lopez and the stolen vehicle. [SUF 10.] However, for several hours, Mr. Lopez would not comply with commands to exit the vehicle or to surrender. [SUF 11.] APD officers continued to try to negotiate with Mr. Lopez to surrender peacefully for approximately 3 hours:

1 trying to convince Mr. Lopez to exit his vehicle and giving commands in both English
2 and Spanish; but Mr. Lopez remained in the vehicle. [SUF 12.] Mr. Lopez also
3 responded to commands by shaking his head, indicating that he would not exit the
4 stranded vehicle. [SUF 13.]

5 At a certain point, law enforcement officers saw Mr. Lopez inside of the Dodge
6 Charger with what they believed to be a gun in his right hand. [SUF 14.] The officers
7 also observed Mr. Lopez smoking something from a foil and through a pipe,
8 suggesting that Mr. Lopez was taking illegal drugs. [SUF 15.] Officers also reported
9 seeing Mr. Lopez making furtive movements, such as reaching under the front
10 passenger seat with both hands and talking on a cell phone. [SUF 16.] Officers also
11 observed Mr. Lopez take a pen from the center console and write something, which
12 was discovered to be a suicide note after the incident. [SUF 17.] Mr. Lopez then
13 placed his vehicle's floor mats over the car's windows: to obscure officers' views.
14 [SUF 18.] This information was relayed to the officers responding to the scene, who
15 viewed Lopez's conduct as indicating a threatening intent. [SUF 19.]

16 As a result, APD SWAT was called to respond to the scene and took control of
17 the scene at approximately 9:07 p.m. [SUF 20.]

18 At approximately 9:34 p.m., APD SWAT was informed that Mr. Lopez had
19 advised a family member that he intended to commit "suicide by cop": which raised
20 the officers concerns that he might try to seriously injure someone in order to provoke
21 the officers to shoot him. [SUF 21.] Shortly thereafter, notwithstanding the
22 obstruction of the mats in the car windows, Mr. Lopez was seen shifting to the back
23 seat of the vehicle. [SUF 22.] The officers at the scene, including the defendant
24 officers, viewed the totality of Lopez's aforementioned conduct up to that point as
25 threatening and potentially pre-assaultive. [SUF 23.]

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1 **C. APD SWAT Officers Attempt to Detain Mr. Lopez, Who Proceeds**
2 **to Run Towards APD SWAT Officers While Pointing a Black Object**
3 **At Officers With Mr. Lopez's Right Hand, Believed To Be A Gun.**

4 APD SWAT members then lined up near the Dodge Charger in the following
5 order: Defendant Officer Brett Heitmann, Defendant Sergeant Paul Delgado, non-
6 defendant APD Officer Ricky Reynoso (armed with a less-lethal 40 mm weapon),
7 Defendant Officer Catalin Panov, Defendant Sergeant Kenneth Weber, and non-
8 defendant APD K-9 Officer Brandon Mullins. [SUF 24.]

9 At 10:00 p.m., officers deployed a flash-bang on the hood of the Dodge Charger
10 and a chemical agent akin to pepper spray through the rear windshield. [SUF 25.]
11 Mr. Lopez then finally emerged from the rear door driver's side of the vehicle and he
12 began fleeing from the SWAT officers. [SUF 26.] Officers commanded Mr. Lopez
13 to put his hands up. [SUF 27.] Ignoring the officers' commands, Mr. Lopez stopped
14 running *away* from the officers, instead turning *towards* the SWAT officers and
15 quickly pointed at them with a black object in his right hand while beginning to run
16 in the officers' direction. [SUF 28.] Seeing this, Defendant Officer Panov responded
17 by shouting, "Gun, gun, gun." [SUF 29.]

18 In that split-second moment, the APD SWAT officers present believed that
19 Lopez was about to fire a gun at them. [SUF 30.] Accordingly, Defendant Officer
20 Heitman fired 4 to 5 shots from his rifle; Defendant Officer Panov also concurrently
21 fired 10 shots from his handgun; Defendant Sergeant Weber also concurrently fired 5
22 shots from his handgun; and Defendant Sergeant Delgado concurrently fired four
23 shots from his rifle. [SUF 31.] All shots were fired in about 2.2 seconds. [SUF 32.]

24 Mr. Lopez then fell to the ground with his arms under his front torso. [SUF
25 33.] Because the APD SWAT officers present could not see where the black object
26 they perceived as a gun was now located, and because Mr. Lopez had just threatened
27 them and appeared to be ignoring additional commands, Officer Reynoso deployed a
28 40 mm (non-lethal) foam-tipped round against Mr. Lopez's lower body: to determine

1 his responsiveness and to redress the threat they still believed Mr. Lopez posed: as
2 officers on the scene believed that there was a firearm under Lopez's body. [SUF 34.]
3 However, Mr. Lopez did not move in response to the 40mm deployment. [SUF 35.]
4 Seeing this, APD SWAT officers then approached, handcuffed, and searched Mr.
5 Lopez. [SUF 36.]

6 At around 10:06 p.m., APD SWAT officers then determined that Mr. Lopez
7 was deceased at the scene. [SUF 37.] Additionally, a firearm was not found in Mr.
8 Lopez's possession. [SUF 38.] After the shooting, the black object was determined
9 to be a black pouch; however, at all times before shots were fired, the defendant
10 officers had believed that object held by Mr. Lopez to be a gun that he was raising to
11 fire at them. [SUF 39.]

12 **3. ANAHEIM OFFICER DEFENDANTS ARE ENTITLED TO
13 JUDGMENT ON PLAINTIFFS' CLAIM FOR INTERFERENCE WITH
14 FAMILIAL RELATIONSHIPS.**

15 **A. Anaheim Defendant Officers' Uses of Force During the Incident Did
16 Not Shock the Conscience.**

17 "To prevail on a Fourteenth Amendment claim arising out of the loss of a
18 familial relationship, a plaintiff must show that Defendant's conduct shocks the
19 conscience." *Provencio v. Vazquez*, 258 F.R.D. 626, 640 (E.D. Cal. 2009); *Ochoa v.*
20 *City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022) ("A claim asserting that police
21 officers violated these Fourteenth Amendment rights during a police shooting must
22 show that the officers' conduct shocks the conscience.") (cleaned up).

23 In determining whether the Anaheim Officer Defendants' conduct "shocks the
24 conscience," the Court must first decide which standard of culpability applies. The
25 two standards are whether the Anaheim Officer Defendants acted with: (1) "deliberate
26 indifference" to the harm they caused decedent; or (2) a "purpose to harm" decedent.
27 *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). "[T]he deliberate-indifference
28 test applies if the situation at issue 'evolve[d] in a time frame that permits the officer

1 to deliberate before acting.” *Ochoa*, 26 F.4th at 1056 (quoting *Porter*, 546 F.3d at
2 1137). “Deliberation is not possible if the officers ‘encounter[ed] fast paced
3 circumstances presenting competing public safety obligations.’” *Id.* (quoting *Porter*
4 546, F.3d at 1139). “Deliberation in this context ‘should not be interpreted in the
5 narrow, technical sense.’” *Id.* (quoting *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th
6 Cir. 2010).) For the purpose-to-harm test to apply, the situation at issue must have
7 “escalate[d] so quickly that the officer [had to] make a snap judgment.” *Porter*, 546
8 F.3d at 1137. This test requires “a more demanding showing that [the officers] acted
9 with a purpose to harm [the decedent] for reasons unrelated to legitimate law
10 enforcement objectives.” *Id.* Legitimate objectives can include “arrest, self-
11 protection, and protection of the public.” *Foster v. City of Indio*, 908 F.3d 1204, 1211
12 (9th Cir. 2018). Illegitimate objectives include “when the officer ‘had any ulterior
13 motives for using force against’ the suspect, such as ‘to bully a suspect or ‘get even,’”
14 or when an officer uses force against a clearly harmless or subdued suspect.” *Id.*
15 (citations omitted) (quoting *Gonzalez v. City of Anaheim*, 747 F.3d 789, 798 (9th Cir.
16 2014); *Wilkinson*, 610 F.3d at 554).

17 Here, the Anaheim Officer Defendants did not have time to deliberate before
18 shooting Mr. Lopez. At the time of the shooting, the Anaheim Officer Defendants
19 knew that in the past few hours Mr. Lopez had: stolen a vehicle; fled a traffic stop;
20 proceeded to drive erratically; appeared to have a gun; and failed to peacefully exit
21 his vehicle in surrender, after hours of commands to do so. [SUF 1-13, 17, 27-28.]
22 Thus, when Mr. Lopez abruptly exited his vehicle after the chemical agent
23 deployments, when he then failed to follow commands, and then suddenly changed
24 directions so that he was running with a black object believed to be a weapon pointed
25 at Anaheim Officer Defendants, there was no time to deliberate. [SUF 33-38.] The
26 urgency of that moment – caused by Mr. Lopez’s failure to follow police commands
27 – forced the officers to react instantly, without deliberation; thus the purpose-to-harm
28 test is appropriate in this matter. See, e.g., *Peck v. Montoya*, 51 F.4th 877, 893-894

1 (9th Cir. 2022) (though much of encounter was spent in a “stalemate”, where only a
2 few minutes elapsed between observation of weapon and opening of fire and mere
3 seconds separated commands and fatal shots, purpose-to-harm standard applied).

4 There is nothing in the record suggesting that the Anaheim Officer Defendants
5 had an improper purpose to harm. There is no allegation that the officers sought to
6 bully Mr. Lopez or get even with him. There is no indication that the officers had
7 prior dealings with Mr. Lopez. Rather, the Anaheim Officer Defendants acted out a
8 legitimate law enforcement objective: self-protection and protection of the public
9 from an armed man known to have committed crimes and be violent. Accordingly,
10 because there was no improper purpose to harm here, judgment should be granted for
11 the Anaheim Officer Defendants on Plaintiffs’ cause of action for Fourteenth
12 Amendment interference with familial relationships.

13 **B. Anaheim Officer Defendants Are Entitled to Qualified Immunity.**

14 Qualified immunity protects government officials from suit unless “(1) they
15 violated a federal statutory or constitutional right, and (2) the unlawfulness of their
16 conduct was ‘clearly established at the time.’” *District of Columbia v. Wesby*, 583
17 U.S. 48, 62-63 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). Here,
18 in light of the undisputed material facts, neither prong is satisfied.

19 First, as discussed above, the Anaheim Officer Defendants did not violate
20 Plaintiffs’ Fourteenth Amendment rights.

21 Second, even if the Anaheim Officer Defendants had violated Plaintiffs’
22 Fourteenth Amendment rights, they would still be entitled to qualified immunity
23 because they did not violate clearly established law. To deny qualified immunity, not
24 only must a constitutional right be violated, but that right must be “clearly
25 established” at the time. *Wesby*, 583 U.S. at 62-63. To be clearly established, there
26 need not be “a case directly on point, but existing precedent must have placed the
27 statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S.
28 731, 741 (2011). While in the “rare” case a clearly established right may be obvious,

1 clearly establishing a right usually requires “‘controlling authority’ or a robust
2 ‘consensus of cases of persuasive authority.’” *Wesby*, 583 U.S. at 63, 64 (quoting
3 *Ashcroft*, 563 U.S. at 741-42). The burden is on Plaintiffs to make the showing that
4 “the right’s contours were sufficiently definite that any reasonable official in the
5 defendant’s shoes would have understood he was violating it.” *Kisela v. Hughes*, 584
6 U.S. 100, 105 (2018); *Waid v. Cnty. of Lyon*, 87 F.4th 383, 388, 389 (9th Cir. 2023).

7 It is well-settled that lethal force is justified if an officer has “probable cause to
8 believe that [a] suspect poses a significant threat of death or serious physical injury to
9 the officer or others.” *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 906 (9th Cir.
10 2007) (cleaned up). Reasonableness also does not “always require[] officers to delay
11 their fire until a suspect turns his weapon on them.” *George v. Morris*, 736 F.3d 829,
12 838 (9th Cir. 2015). “If the person is armed—or reasonably suspected of being
13 armed—a furtive movement, a harrowing gesture, or serious verbal threat might
14 create an immediate threat.” *Id.* These principles apply even when officers are
15 reasonably mistaken about the nature of the threat. “Officers can have reasonable,
16 but mistaken, beliefs as to the facts establishing the existence of” an immediate threat,
17 and “in those situations courts will not hold that they have violated the Constitution.”
18 *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Thus, the Constitution even allows for
19 officer’s action that resulted from a reasonable “mistake of fact.” *Pearson v.*
20 *Callahan*, 555 U.S. 223, 231 (2009). When an officer’s “use of force is based on a
21 mistake of fact, we ask whether a reasonable officer would have or should have
22 accurately perceived that fact.” *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th
23 Cir. 2011).

24 The Anaheim Officer Defendants’ mistaken belief that Mr. Lopez possessed a
25 dangerous weapon was reasonable and they were justified in the use of deadly force
26 when Mr. Lopez appeared to be about to shoot the Anaheim Officer Defendants with
27 a black object after being told he had a gun. At the time that Mr. Lopez exited the
28 Dodge Charger, the officers faced a “tense, uncertain, and rapidly evolving”

1 circumstance. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Mr. Lopez had not
2 complied with repeated commands to exit the car, resulting in the use of flash-bang
3 and chemical agent deployment. [SUF 10-12, 24-26.] Then, when Mr. Lopez did
4 exit the car, he again did not comply with commands, instead first running away from
5 and then towards the officers. [SUF 26-28.] Thus, the Anaheim Officer Defendants’
6 use of force was unquestionably reasonable and there was no clearly established law
7 that would have put them on notice that this incident shooting might be
8 unconstitutional. *Reynolds v. Cnty. of San Diego*, 858 F. Supp. 1064, 1072 (S.D. Cal.
9 1994) (citing cases that “support the general principle that an officer may reasonably
10 use deadly force when he or she confronts an armed suspect in close proximity whose
11 actions indicate an intent to attack”), remanded on other grounds, 84 F.3d 1162 (9th
12 Cir. 1996); *see Easley v. City of Riverside*, 89 F.3d 851, 857 (9th Cir. 2018) (finding
13 officer entitled to qualified immunity where officer was concerned about presence of
14 gun, saw suspect grab his waistband, and the suspect pulled an object from his right
15 pants’ pocket and threw it away from his body); *Barnes v. City of Pasadena*, 508 Fed.
16 Appx. 663, 665 (9th Cir. 2013) (“Even if an issue of fact existed about the presence
17 of a gun, the determinative issue was whether the officers reasonably believed
18 [suspect] had a gun and posed an immediate threat to safety.”).

19 Accordingly, the Anaheim Officer Defendants are also entitled to qualified
20 immunity as to Plaintiffs’ claim for interference with familial relationship.

21 **4. DEFENDANTS CITY OF ANAHEIM AND CHIEF JORGE CISNEROS
22 ARE ENTITLED TO JUDGMENT ON PLAINTIFFS’ CLAIMS FOR
23 MUNICIPAL AND SUPERVISORY LIABILITY.**

24 **A. As There is No Evidence of a Constitutional Violation by Anaheim
25 Officer Defendants, Defendants City of Anaheim and Chief Jorge
26 Cisneros are Not Liable to Plaintiffs Under *Monell*.**

27 Plaintiffs’ claims for municipal liability and supervisory liability for (1)
28 unconstitutional custom or policy; (2) ratification; and (3) failure to train are

1 dependent on Plaintiffs first establishing that the Anaheim Officer Defendants
2 violated Plaintiffs' Fourteenth Amendment due process right to a familial relationship
3 with Mr. Lopez. In order to state a municipal liability claim, a litigant must allege
4 that they possessed a constitutional right of which they were deprived. *Van Ort v.*
5 *Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *see City of Los Angeles v.*
6 *Heller*, 475 U.S. 796, 799 (1986); *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994);
7 *McSherry v. City of Long Beach*, 584 F.3d 1129, 1147 (9th Cir. 2009).

8 Under the uncontested facts, as explained above, since Plaintiffs did not
9 suffer a constitutional injury from the actions of the Anaheim Officer Defendants,
10 Defendants City of Anaheim and Chief Jorge Cisneros are entitled to judgment on all
11 of Plaintiffs' claims for municipal liability and supervisory liability.

12 **B. Additionally, Plaintiffs Cannot Identify Any Specific Policy,
13 Practice, or Custom That Was the “Moving Force” Behind a
14 Constitutional Violation.**

15 A local government may be held liable “when implementation of its official
16 policies or established customs inflicts the constitutional injury.” *Clouthier v. Cnty.*
17 *of Contra Costa*, 591 F.3d 1232, 1249 (9th Cir. 2010) (quotation marks omitted),
18 overruled on other grounds by *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir.
19 2016). In order to succeed on a claim based on *Monell* liability, a plaintiff must “prove
20 that (1) he was deprived of a constitutional right; (2) the municipality had a policy;
21 (3) the policy amounted to deliberate indifference to [plaintiff or plaintiff’s
22 decedent’s] constitutional right; and (4) the policy was the moving force behind the
23 constitutional violation.” *Lockett v. Cnty. of Los Angeles*, 977 F.3d 737, 741 (9th Cir.
24 2020). A policy within the meaning of *Monell* exists where official policy makers
25 “consciously” choose a particular course of action or procedure “from among various
26 alternatives.” *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); *Pembaur v.*
27 *City of Cincinnati*, 475 U.S. 469, 483 (1986) (“municipal liability under § 1983
28 attaches where – and only where – a deliberate choice to follow a course of action is

1 made from among various alternatives by the official or officials responsible for
2 establishing final policy with respect to the subject matter in question”).

3 However, “[l]iability for improper custom may not be predicted on isolated or
4 sporadic incidents; it must be founded upon practices of a sufficient duration,
5 frequency and consistency that the conduct has become a traditional method of
6 carrying out policy.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

7 Here, Plaintiffs have no evidence of any specific policy, practice, or custom
8 that was the “moving force” behind the alleged constitutional violation of the
9 Anaheim Officer Defendants’ use of lethal force during the incident involving Mr.
10 Lopez. Thus, summary judgment should be granted in favor of Defendants City of
11 Anaheim and Chief Jorge Cisneros as to Plaintiffs’ claim for municipal and
12 supervisorial liability for unconstitutional custom or policy.

13 **C. Plaintiffs Cannot Establish Ratification.**

14 *Monell* liability can also be established “when the individual who committed
15 the constitutional tort was an official with final policy-making authority or such an
16 official ratified a subordinate’s unconstitutional decision or action and the basis for
17 it.” *Clouthier*, 591 F.3d at 1249. “If the authorized policymakers approve a
18 subordinate’s decision and the basis for it, their ratification would be chargeable to the
19 municipality because their decision is final.” *City of St. Louis v. Praprotnik*, 485 U.S.
20 112, 127 (1988). “There must, however, be evidence of a conscious, affirmative
21 choice” on the part of the authorized policymaker. *Gillette v. Delmore*, 979 F.2d
22 1342, 1347 (9th Cir. 1992). To show *Monell* liability under a ratification theory, the
23 Supreme Court has held that the final policymaker must make a deliberate choice
24 from among various alternatives to follow a particular course of action. *Pembaur*,
25 475 U.S. at 483-84. The final policymaker must have approved not only the
26 subordinate’s decision, but also the basis for it. See *Praprotnik*, 485 U.S. at 127 (“If
27 the authorized policymakers approve a subordinate’s decision and the basis for it,
28 their ratification would be chargeable to the municipality because their decision is

1 final.”). Accordingly, ratification requires, among other things, knowledge of the
2 alleged constitutional violation.” *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir.
3 1999).

4 Failure to discipline employees, without more, is insufficient to establish
5 ratification. *Clouthier*, 591 F.3d at 1253-54. “Ratification . . . generally requires more
6 than acquiescence.” *Sheehan v. City and Cnty. of San Francisco*, 743 F.3d 1211, 1231
7 (9th Cir. 2014), *rev’d in part on other grounds*, 575 U.S. 600 (2015). Here, there is
8 no evidence sufficient to support a finding that a final policy maker for Defendant
9 City of Anaheim – Defendant Chief Jorge Cisneros or otherwise -- made a conscious,
10 affirmative choice to approve the Anaheim Defendant Officers’ actions during the
11 incident (if such were unconstitutional, which they were not). *See Rabinovitz v. City*
12 *of Los Angeles*, 287 F.Supp.3d 933, 967 (C.D. Cal. 2018) (granting summary
13 judgment where “[p]laintiff’s sole piece of evidence in support of their ratification
14 theory is the uncontested fact that [defendant] has never been disciplined” and
15 characterizing such evidence as “woefully inadequate to prove ratification”);
16 *Caldwell v. City of S.F.*, 2020 U.S. Dist. LEXIS 242004, at *54-56 (N.D. Cal. Dec.
17 23, 2020) (granting summary judgment on a ratification theory where plaintiff did not
18 put forth any evidence indicating the police chief or any other policymaker was aware
19 of the allegedly unconstitutional conduct).

20 Therefore, Plaintiffs’ claim for municipal and supervisorial liability for
21 ratification fails as a matter of law and judgment should be granted on this cause of
22 action accordingly.

23 **D. Plaintiffs Cannot Establish a Program-Wide Inadequacy in
24 Training at APD.**

25 Plaintiffs may also establish *Monell* liability when “omissions,” including the
26 failure to train employees, “amount to the local government’s own official policy.”
27 *Clouthier*, 591 F.3d at 1249. To state a failure to train claim, a plaintiff must show
28 “(1) he was deprived of a constitutional right, (2) the City had a training policy that

1 ‘amounts to deliberate indifference to the [constitutional] rights of the persons’ with
2 whom [its police officers] are likely to come into contact, and (3) his constitutional
3 injury would have been avoided had the City properly trained those officers.”
4 *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007) (alterations in
5 original) (internal quotation marks omitted). “[E]vidence of the failure to train a
6 single officer is insufficient to establish a municipality's deliberate policy.” *Id.*
7 “[A]bsent evidence of a ‘program-wide inadequacy in training,’ any shortfall in a
8 single officer’s training ‘can only be classified as negligence on the part of the
9 municipal defendant - a much lower standard of fault than deliberate indifference.’”
10 *Id.* at 484-85 (quoting *Alexander v. City and Cnty. of San Francisco*, 29 F.3d 1355,
11 1367 (9th Cir. 1994)).

12 Here, there is no evidence that APD inadequately trained its officers throughout
13 its program. Rather, APD’s policies clearly demonstrate that APD trains its officers
14 to act in accordance to the appropriate legal standard, including, but not limited to,
15 the factors to determine the reasonableness of force and when lethal force should be
16 used. [SUF 40.] Summary judgment should also be granted in favor of Defendants
17 Defendants City of Anaheim and Chief Jorge Cisneros as to Plaintiffs’ claim for
18 municipal and supervisorial liability for failure to train on this basis.

19 **5. DEFENDANTS ARE ENTITLED TO JUDGMENT ON PLAINTIFF**
20 **JOHANNA LOPEZ’S CLAIM FOR NEGLIGENT INFILCTION OF**
21 **EMOTIONAL DISTRESS BECAUSE SHE DID NOT SEE THE**
22 **SHOOTING & WAS THUS NOT A BYSTANDER.**

23 The California Supreme Court has established a three-part test which must be
24 satisfied in order for a plaintiff to state a cause of action for “bystander” negligent
25 infliction of emotional distress, as Plaintiff Johanna Lopez alleges here: “In the
26 absence of physical injury or impact to the plaintiff himself, damages for emotional
27 distress should be recoverable only if the plaintiff: (1) is closely related to the injury
28 victim; (2) is present at the scene of the injury-producing event at the time it occurs

1 and is then aware that it is causing injury to the victim; and (3) as a result suffers
2 emotional distress beyond that which would be anticipated in a disinterested witness.”
3 *Thing v. La Chusa*, 48 Cal.3d 644, 647 (1989) (emphasis added). Absent immediate
4 witness of the injury-producing event, recovery is precluded. *Id.* at 647-648, 669.

5 In other words, the emotional distress must occur “as a result” of a plaintiff’s
6 presence at the injury-producing event and *contemporaneous* awareness that the event
7 is causing injury to the victim. A plaintiff may not recover for all emotional distress
8 suffered as a result of the victim’s injury. Instead, the plaintiff may recover *only* for
9 the emotional distress suffered as a result of plaintiff’s on scene witness and awareness
10 of the injury-causing event. See *Krouse v. Graham*, 19 Cal. 3d 59, 77-78 (1977)
11 (husband could recover for the emotional injury suffered as the “direct emotional
12 impact of his sensory and contemporaneous observance of the accident,” but not for
13 any injury caused from his grief and sorrow over the loss of his wife or his feelings
14 of anger and retribution).

15 Here, **Plaintiff Johanna Lopez admits that she did not see any aspect of the**
16 **shooting incident**; rather, she alleges that she *heard* gunshots and *assumed* that Mr.
17 Lopez was being injured and/or killed at that time. [SUF 41.] Thus, the second
18 element of Plaintiff Johanna Lopez’s emotional distress claim is absent: as she was
19 unaware the event was causing injury to Mr. Lopez, rather, she merely speculatively
20 assumed such to be the case. [*Id.*]

21 “Although a plaintiff may establish presence at the scene through nonvisual
22 sensory perception, someone who *hears* an accident but does not then *know* it is
23 causing injury to a relative *does not have a viable bystander claim for negligent*
24 *infliction of emotional distress*, even if the missing knowledge is acquired moments
25 later.” *Ra v. Superior Court*, 154 Cal.App.4th 142, 149 (2007) (cleaned up) (emphasis
26 added). Thus, “the absence of a contemporaneous sensory awareness of the causal
27 connection between the injury-producing event and the resulting injury precludes
28 recovery.” *Id.* (cleaned up).

1 “It is the traumatic effect of the [contemporaneous] perception of the infliction
2 of the injury on a closely related person (whether visual or not) that is actionable, not
3 the observation of the consequences of the occurrence or the contemporaneous
4 perception of endangerment, which, while potentially stressful, is insufficient to cause
5 legally cognizable harm.” *Id.* at 152 (cleaned up). Thus, absent a reasonable *certainty*
6 that Mr. Lopez was being injured at the time of the incident, what Plaintiff Johanna
7 Lopez experienced at that time was simply fear and speculative assumption.
8 “Although the emotional distress caused by that fear was no doubt real and substantial
9 (as was the distress resulting from the subsequently acquired knowledge [of the
10 injury]), it is not compensable in a bystander claim.” *Id.* Accordingly, because
11 Plaintiff Johanna Lopez has no material evidence to demonstrate that she was
12 reasonably *certain* that Mr. Lopez was injured at the time she heard gunshots on the
13 date of incident, her claim for negligent infliction of emotional distress fails as a
14 matter of law and judgment should be granted for Defendants.

15 **6. PLAINTIFFS’ REQUEST FOR PUNITIVE DAMAGES LACKS
16 MERIT.**

17 To obtain punitive damages, a plaintiff must prove that a defendant’s actions
18 were malicious, oppressive, or in reckless disregard of the plaintiffs’ rights. *Dang v.
19 Cross*, 422 F.3d 800, 810 (9th Cir. 2005). The Supreme Court determined that
20 punitive damages are available in a § 1983 action only when a defendant’s conduct is
21 shown to be motivated by evil motive or intent or when it involves reckless or callous
22 indifference to the federally protected rights of others. *Smith v. Wade*, 461 U.S. 30,
23 51 (1983). Where there is no evidence that a § 1983 defendant acted with evil intent,
24 there is no legal right to punitive damages. *Ward v. City of San Jose*, 967 F.2d 280,
25 286 (9th Cir. 1991). Here, there is no evidence the Anaheim Officer Defendants acted
26 with evil intent; judgment on this claim is thus proper.

27 ///

28 ///

1 **7. CONCLUSION.**

2 Accordingly, for the foregoing reasons, the Court should grant summary
3 judgment in favor of the Defendants in this action.
4

5 DATED: July 15, 2024

LEWIS BRISBOIS BISGAARD & SMITH LLP

6

7 By: _____ */s/ Abigail J.R. McLaughlin*

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FEDERAL COURT PROOF OF SERVICE
LOPEZ, ANTONIO, et al. v. CITY OF ANAHEIM, et al.
Case No. 8:22-cv-1351

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On July 15, 2024, I served the following document(s): NOTICE OF MOTION AND MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT, OR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

- (BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on July 15, 2024, at Los Angeles, California.

/s/ Corinne Taylor

Corinne Taylor

SERVICE LIST
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